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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

**FILE: B-190359**

**DATE: March 24, 1978**

**MATTER OF: General Kinetics, Inc.**

**DIGEST:**

1. Protester contends that awardee did not satisfy one of solicitation's definitive responsibility criteria--certain minimum tape processing capability--and planned to use only two sets of equipment when at least three would be required. Since awardee proposed using three sets of equipment and contracting office verified that such equipment was currently or readily available, GAO has no basis to object to contracting officer's determination that awardee satisfied solicitation's minimum tape processing capability.
2. Protester contends that contracting officer had no reasonable basis to determine that awardee was responsible. Contention will not be considered since GAO has discontinued practice of reviewing protests against affirmative determinations of responsibility, absent circumstances not applicable here.
3. Contention--that solicitation's tape transport equipment specifications are in error--is untimely under GAO Bid Protest Procedures and will not be considered because it concerns alleged defect which was apparent, but not raised, prior to closing date for receipt of initial proposals.
4. Contention that solicitation was designed without evaluation factors is without merit since RFP's uncontested evaluation scheme--followed by agency--was clearly to award contract to responsible offeror submitting low-priced, technically acceptable proposal.

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5. Protester contends that solicitation did not reflect current Government needs. Based on contracting officer's explanation that Government's needs as stated in solicitation remained unchanged, GAO has no basis to conclude that solicitation did not reflect Government's current needs.
6. Protester contends that post-best-and-final date meeting between contracting officer, his technical advisers, and awardee was for purpose of making awardee's technically unacceptable proposal acceptable; thus, awardee should have been considered outside competitive range. GAO will not question agency's determination that proposal involving highly technical services was within competitive range where, as here, there has been no showing of unreasonableness.
7. Protester contends that meeting between contracting officer, his technical advisers and awardee, held after best and final offers, constituted improper discussions. Since meeting was for sole purpose of confirming matters clearly stated in awardee's proposal and to confirm awardee's general capability to perform, and since no new information resulted and proposed price, equipment, and approach remained unchanged, GAO cannot conclude that meeting constituted improper discussions.

General Kinetics, Inc. (GKI), protests the award of a contract to KYBE Corp. under request for proposals (RFP) No. MDA-904-78-R-0008, as amended, issued by the Maryland Procurement Office, National Security Agency (NSA), for the rehabilitation of electronic processing tapes and instrumentation tapes, cleaning and repair of glass reels, and related matters. GKI contends that the award to KYBE was improper because (1) KYBE failed to meet one of the RFP's definitive responsibility criteria--capability to process acceptable tapes at minimum rates--and was otherwise not responsible, (2) the RFP contained defective specifications,

- (3) the RFP was designed without evaluation factors and did not reflect current Government needs, and
- (4) discussions were held with KYBE after receipt of best and final offers.

#### TAPE PROCESSING CAPABILITY

The basis for GKI's initial protest was the belief that KYBE did not satisfy the requirements of RFP section H.1--that the "contractor shall have the capability to process acceptable tapes at the following minimum rates, delivery beginning 1 November 1977." GKI, the incumbent contractor, thoroughly demonstrated, in its initial submission, that at least three sets of machines would be necessary to accomplish the rehabilitation of instrumentation tape, type II. GKI believed that KYBE planned to use only two sets of machines since after award on October 2, 1977, personnel from KYBE expressed an interest in purchasing certain equipment from GKI. GKI contends that the procuring agency either failed to ascertain whether KYBE could meet the requirements of section H.1 or improperly waived those requirements.

After submission of GKI's protest, the agency explained to GKI, at a debriefing, that KYBE proposed using three sets of equipment, not just two as suspected. Before award, the contracting officer and his technical representatives met with personnel from KYBE to verify the availability of equipment which KYBE proposed. At that meeting, each proposed piece of equipment was discussed; as a result, the contracting officer concluded that KYBE possessed, or had immediately available upon request, all required equipment.

Next, GKI points to a statement dated November 16, 1977, by the contracting officer that KYBE's third analyzer was currently in the process of being fabricated. Accordingly, GKI contends that the contracting officer's responsibility determination must have been made without a reasonable basis. In response, the contracting officer states that from November 1, 1977, the date delivery was to have begun, KYBE's performance, with respect to both quality and quantity, has been in complete accord with the RFP's requirements.

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Citing Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376, and other decisions, GKI contends that in situations like the instant case, our Office will review the contracting officer's affirmative determination of responsibility to see if the RFP's objective responsibility criteria have been met. We note, however, that section H.1 required the "contractor," not an "offeror," to have the specified capability. Therefore, an offeror merely had to have the reasonably foreseeable ability to perform the work and begin delivery on November 1, 1977. Based on the language of section H.1, and our in camera examination of KYBE's proposal, a contemporaneous agency memorandum of the preaward equipment verification meeting, and explanations of the parties, we have no basis to disagree with the contracting officer's determination that KYBE possessed the capability to meet section H.1's criteria.

#### AFFIRMATIVE RESPONSIBILITY DETERMINATION

GKI also contends that KYBE could not and has not properly performed under its contract and that there was no proper basis for finding KYBE to be responsible because the contracting officer admits that KYBE has had no prior experience in processing the instrumentation tape. GKI further contends that KYBE's prior experience under contracts for rehabilitation of audio tapes is not similar to the processing of instrumentation tape; careful scrutiny and independent investigation will reveal that the contracting officer's statements in this regard are entirely erroneous. In addition, GKI has been advised that KYBE experienced considerable difficulty under its audio tape contracts, with the Government eventually waiving many of the specification requirements; thus, contrary to the contracting officer's assertions, GKI concludes that there was no rational basis for concluding in August or September 1977 that KYBE had the requisite capabilities to assure satisfactory performance and, hence, was eligible for consideration.

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Our Office has discontinued the practice of reviewing protests against affirmative determinations of responsibility, except in limited situations not applicable here. See, e.g., T&G Aviation, B-186096, June 21, 1976, 76-1 CPD 397. Accordingly, this aspect of GKI's protest will not be considered.

ALLEGED DEFECTIVE SPECIFICATIONS

GKI's contention, first raised after award, that there is an error in the RFP's specifications regarding tape transport equipment--a contention denied by the agency--concerns an alleged defect which was apparent prior to the closing date for receipt of initial proposals. Since the contention was not raised prior to such closing date, the matter is untimely under our Bid Protest Procedures and will not be considered. 4 C.F.R. § 20.2(b)(1) (1977).

OTHER ALLEGED SOLICITATION DEFECTS

The contracting officer made the following statement as a portion of the agency report:

"The fact is that the RFP was not designed with any evaluation factors per se. The technical personnel considered section C.42 - 'Proposal Preparation' to offer a sufficient basis upon which to judge the adequacy of the non-incumbent offerors' capabilities. KYBE's proposal was in all respects responsive to the RFP. The choice of words in the 23 September 1977 technical evaluation was merely a reflection of a heightened concern for the adequacy of the RFP guidelines by the technical personnel due entirely to use developments that had occurred subsequent to the issuance of the RFP. These developments made the availability and steady supply of rehabilitated tapes more critical than before."

Based on this statement, GKI concludes that the RFP was designed without evaluation factors and it

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did not reflect current Government needs, thus mandating cancellation of KYBE's contract.

With regard to the RFP's evaluation factors, after receipt of initial proposals and discussions with offerors, and after the agency's determination that both offerors' proposals were technically acceptable, the RFP was amended to provide as follows:

"Evaluation of proposals will be based on the LOWEST TOTAL AGGREGATE PROPOSAL received. The lowest total aggregate proposal shall be determined by multiplying the unit price by the quantities of each item and totaling the entire amount of Section E."

Using this evaluation formula, KYBE submitted the lowest total aggregate price and award was made to KYBE. GKI's contention regarding the RFP's lack of evaluation factors is without merit since the RFP's uncontested evaluation scheme--followed by the agency--was clearly to award the contract to the responsible offeror submitting the low-priced, technically acceptable proposal.

With regard to whether the RFP reflected current Government needs, in the same document referred to by GKI the contracting officer explained that the Government's needs as stated in the RFP remained unchanged. There was, however, concern by the agency's technical personnel that KYBE fully understood how important uninterrupted production of tapes was to the Government. After examining the entire record, we have no basis to conclude that the RFP did not reflect the Government's current needs.

ALLEGED DISCUSSIONS AFTER  
BEST AND FINAL OFFERS

The closing date for best and final offers was September 12, 1977. By memorandum dated September 23, 1977, technical evaluators concluded that absent an

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actual demonstration by KYBE of its tape rehabilitation process--not called for in the RFP--there was no "hard evidence" of KYBE's ability to perform. Prior to that time, the contracting officer concluded that KYBE possessed the technical capability and that no preaward survey was necessary because KYBE was an established, qualified supplier having successfully performed two recent NSA contracts for tape rehabilitation. Because of the doubts raised by the technical personnel, on September 28, 1977, the contracting officer and his technical representatives met with personnel from KYBE to verify the availability of equipment listed in KYBE's proposal and to be certain that KYBE understood the importance of the RFP's delivery provisions. As a result of this meeting, the contracting officer again concluded that KYBE had the technical capability to meet the RFP's requirements.

Based on these events, GKI contends first that about 2 weeks after submission of best and final offers, NSA's technical evaluation personnel issued a report which states, in essence, that KYBE was ineligible for award; therefore, since KYBE had not established the acceptability of its proposal even after submission of best and final offers, it is clear that KYBE could not have established such acceptability prior to such submission.

Accordingly, citing Associates, Inc., B-186353, September 22, 1976, 76-2 CPD 268, and Energy Research Corp., B-185018, July 13, 1976, 76-2 CPD 37, GKI concludes that only it should have been asked to submit a best and final offer.

Secondly, GKI contends that the meeting on September 28, 1977, violated Armed Services Procurement Regulation (ASPR) § 3-805.3(d) (1976 ed.) because NSA unlawfully reopened negotiations solely with KYBE for the express purpose of enabling KYBE to make acceptable a proposal which otherwise had to be rejected.

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In response, the contracting officer reports that KYBE's initial proposal was considered within the competitive range and at all times was considered eligible for award. He also reports that he contacted KYBE after receipt of best and final offers, not for the purpose of giving an opportunity to revise or modify the proposal, but to seek clarifications to confirm KYBE's understanding of the Government's requirements; no new information resulted from this contact, nor did prices, proposed approach or equipment lists change.

With regard to GKI's competitive range contention, GKI refers to our decisions in (1) Electronic Associates, Inc., supra, wherein we held that a proposal failing to clearly show the experience required, as required by the RFP, was properly excluded from the competitive range; and (2) Energy Research Corp., supra, wherein we held that an agency was not required to conduct competitive range discussions with an offeror who submitted an unacceptable proposal. Neither situation is present in the instant case. Here, the agency determined that KYBE's proposal was technically acceptable and KYBE was responsible--determinations with which we have not objected--before requesting best and final offers. Even if KYBE's proposal was only marginally acceptable, competitive range discussions would have been proper. ASPR § 3-805.2(a) (1976 ed.). Moreover, the determination of whether a proposal is in the competitive range, particularly with respect to highly technical service procurements, is primarily a matter of administrative discretion and ordinarily will be accepted by this Office, absent a clear showing of unreasonableness. Systems Consultants, Inc., B-187745, August 29, 1977, 77-2 CPD 153. After examining the record, we must conclude that the protester has failed to make the required showing of unreasonableness.

Regarding GKI's next contention, whether discussions have been held is a matter to be

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determined upon the basis of the particular actions of the parties, and not merely upon the characterizations of the contracting agency or the protester. We have held that discussions have been conducted when an offeror is afforded an opportunity to change or modify its proposal. 51 Comp. Gen. 497 (1972). We have also held that a meeting with an offeror after the close of negotiations, which was intended only as an opportunity for the prospective contractor to explain its price reductions and was in fact so limited, did not constitute discussions. B-170989, B-170990, November 17, 1971. In addition, we have held that discussions were not conducted when, after the closing date, a contracting officer permitted an offeror to submit a certification that its sample met the specifications because the offeror was already committed to comply with the specifications by signing and submitting a proposal. Fechheimer Brothers, Inc., B-184751, June 24, 1976, 76-1 CPD 404.

Since the post-closing date meeting was for the sole purpose of confirming matters clearly stated in KYBE's proposal and to confirm KYBE's general capability to perform as outlined in its proposal, and since no new information resulted and proposed price, equipment and approach remained unchanged, we have no basis to conclude that the meeting constituted improper discussions. See Radiation Systems, Inc., B-180260, July 29, 1974, 74-2 CPD 65. Compare PRC Information Sciences Company, 56 Comp. Gen. 768 (1977), 77-2 CPD 11 (wherein we held that since after the close of negotiations one offeror was permitted an opportunity to modify its proposed price, every offeror within the competitive range should have been provided an opportunity to change or modify its proposal because all offerors are entitled to equal treatment).

Protest denied.

Deputy

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Comptroller General  
of the United States